UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADT, LLC, a wholly-owned subsidiary of
ADT Corporation, Respondent,

and Case 05-CA-127502

Local 2, Office and Professional Employees
International Union, AFL-CIO, Charging Party.

CHARGING PARTY OPEIU LOCAL 2 BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Charging Party Local 2 of the Office and Professional Employees International Union, AFL-CIO ("OPEIU Local 2"), presents this brief, pursuant to Section 102.46(e) of the Board's Rules and Regulations on the evidence and the administrative law judge decision[1], in support of cross-exceptions to the failure of the Administrative Law Judge to find that the General Counsel has proven the allegations of paragraph 9(a) of the Complaint against Respondent ADT, LLC, a wholly-owned subsidiary of ADT Corporation, for violations of Section 8(a)(5) and (1) of the Act at the Respondent's service shops represented in three separate bargaining units in Springfield, VA, Lanham, MD, Baltimore (Columbia), MD and Gaithersburg, MD.

I. The ALJ's finding of "contractual" waiver is unsupported by the record.

The facts in this case are not in dispute. During the week of April 14, 2014, ADT management unilaterally changed the payroll and compensation terms for all employees classified as residential and small business high volume commissioned installers (HCVI installers) working from the ADT service shops in Springfield, VA and Lanham, MD, Baltimore (Columbia, MD) and Gaithersburg, MD to an hourly-based compensation system. The installers

[1] Transcript of proceedings held on October 2, 2014 before Administrative Law Judge Arthur J. Amchan and the General Counsel Exhibits admitted into evidence, in Case 05-CA-127502.

have experienced, since April 16, 2014, a significant reduction in payroll compensation as a result. It is undisputed that the classification of "high volume commissioned installer" is included in the recognition clauses of each of the three unit collective bargaining agreements.

"It is well established that 'once a specific job has been included within the scope of a bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that [position] without first securing the consent of the union or the Board.'" *Wackenhut Corp.*, 345 NLRB 850, 852 (2005) (quoting *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992)). *Accord*: *Holy Cross Hospital*, 319 NLRB 1361, 1361 fn. 2 (1995). See also *Centurylink*, 358 NLRB No. 134, slip op. at 1 (2012). The parties' bargaining history in each of the three units, as described in the record testimony of Mr. Kapanoske and Mr. Nixdorf, confirms that the separate classification of "residential and small business high volume commissioned installers" was included in the scope of each unit and that ADT management cannot unilaterally remove *or modify* that position without first securing the consent of the union or the Board.

Here, ADT's April 2, 2014 announcement by Nixdorf that: "[t]he Company is moving all of our Commission Only technicians to the hourly schedule pursuant to the High Volume language for Columbia, Gaithersburg, Springfield and Lanham" is not a sound, arguable or good faith interpretation of those contracts. Under the contract language, ADT's actions regarding "eliminat[ion] and transfer between HCVI and hourly Installation" is expressly conditioned by the phrase "as business needs dictate". When Union representative Kapanoske demanded information on the asserted business needs, Nixdorf refused to provide the basis for even an arguable interpretation of the contractual phrase "as business needs dictate". Nixdorf's April 18th statement was simply that "the union has ceded its ability to bargain over this issue".

II. Testimony of ADT witness confirms that unilateral, simultaneous "transfer" of the entire compliment of HVCI installers in each of the three bargaining units to an hourly rate was never contemplated by the parties.

The language and bargaining history between ADT and OPEIU Local 2 in the in Springfield, VA and Lanham, MD, Baltimore (Columbia, MD) and Gaithersburg, MD bargaining units does not support ADT's bargaining waiver claims in this case. The testimony of George Kapanoske, confirming his personal experience in this bargaining relationship as the representative of these ADT employees since 1993, confirms that nothing in the Agreements or negotiations shows that the Union consented to the wholesale elimination of the HVCI classification or consent to allow ADT to unilaterally modify the pay plans of these employees, across the board, resulting in significant reductions in compensation. Transcript pages 17 to 45.

On the other hand, ADT negotiator Nixdorf explained that he was not part of any of the original negotiations of the HVCI clauses in the Agreements, and simply carried forward prior language. Transcript p.p.67, 68-69. Mr. Nixdorf confirmed that the ADT proposal for complete elimination of the HCVI classification was proposed by the Employer in each negotiations he participated in, and was rejected for a compromise where the individual HCVI installers were given an opportunity to voluntarily transfer to the hourly rate classification for a "window period" beginning upon the implementation of the new HCVI rates.

Transcript page 72:

> "Q. BY MR. WALLINGTON: Mr. Nixdorf, in the negotiations at Gaithersburg, one of the Company's last proposals before reaching agreement was to withdraw all commission installer compensation items from the Company's proposal and place all installers on an hourly schedule, correct?
> A. No. The Company's position, throughout bargaining for all three, has been that under the management's rights clause, we have the right to move people from one classification to another, and so, you know, the proposal that you're referring to was actually the Union's rejection of Schedule C, and so our position was, okay, if you don't accept Schedule C, then what we'll do is eliminate the provisions for

high volume in the contract, and then there was a package deal with a wage increase."

Transcript page 73:

"Q. Okay. So when the Company made that proposal, the Union did accept Schedule C at the Gaithersburg and also at Gaithersburg part of the agreement, was it not, that any -- that the installer employees could work for a 90 day time period, 90 or 60 day time period, under the new Schedule C, and if they felt that they weren't earning as much as they could earn under the hourly rates, they could, at the employee's option, move to an hourly classification, correct? That's the 60-day opt-out language.
A. The 60-day opt-out dealt with the issue of the employee -- Q. Right. A. -- opting out -- Q. Correct. A. -- but it didn't -- I mean the Company always maintained that we had the ability to move from commission to hourly.
Q. And had in your experience under these three units, the Employer had never exercised an action eliminating all commission rates on all three contracts at the same time? It never exercised that right, had it? A. No."

Nixdorf confirmed that the experience of the employees in each of the bargaining units was that movement between the HVCI job classification and the hourly classification was on a job by job or single employee basis, through an express agreement between OPEIU Local 2 and the Employer (the 60-day or 90-day opt out). Transcript p.p. 74-75. As Judge Amchan's examination confirmed, the Employer had never made a wholesale change to the HVCI classification in all three units until April, 2014. Transcript p. 75. After a review of his affidavit to Region 5 investigators, Nixdorf testified that the negotiations in Columbia and Springfield concluded with an individual, one-time opt-out opportunity for each of the individual HVCI installers. Transcript p.p. 78-79. Nixdorf claims that, despite this bargaining history, "…we reserved the right to move individuals or the group…" Transcript p. 74, line 23.

However, such express reservation language is **not** contained in the terms of any CBA or other agreement between the parties. The Administrative Law Judge and ADT relied on the

following language in the Gaithersburg, Springfield/Lanham and Columbia (Baltimore) CBAs as the sole proof of a Union waiver. The phrase is:

"The Employer reserves the right to eliminate and reinstate the High Volume Commissioned Installer Program at any time and/or transfer employees between HVCI and hourly Installation as business needs dictate."

Because ADT has refused to provide the justification for the bargained-for precondition of "as business needs dictate", this Board should not allow avoidance of the Respondent's bargaining obligations set out in paragraph 9(a) of the Complaint. In order to establish the waiver of a statutory right to bargain over changes in terms and conditions of employment, the party asserting waiver must establish that the right has been clearly and unmistakably relinquished. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1981) ("[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable"); *Centura Health St. Mary-Corwin Medical Center*, 360 NLRB. No. 82 (Apr. 24, 2014). "The clear and unmistakable waiver standard . . . requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811-812 (2007).

Waivers may be found in the express language of the collective bargaining agreement, or can be inferred from bargaining history, past practice, or a combination thereof. *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989). The Board requires, however, that a matter was consciously explored during bargaining, and that a union unmistakably waived its interest. See,

e.g., *Allison Corp.*, 330 NLRB 1363, 1365 (2000) (holding that a management-rights clause, which expressly waived decisional bargaining, did not also waive effects bargaining).

As shown by the testimony of the October 2, 2014 hearing in this case, this language, if discussed at all during negotiations at Gaithersburg, Springfield/Lanham and Columbia (Baltimore), was mutually recognized to allow the Employer to address specific needs in servicing customers in particular markets. There is no bargaining history that shows that the bargaining partners unequivocally and specifically expressed their mutual intention to permit unilateral employer action to eliminate the HVCI classifications and make a wholesale change of Installer pay plans from commission to hourly.

ADT's rationalization for its actions in the complete elimination of the HVCI classification and unilaterally changing the HVCI commissioned pay plan in April 2014, are not supported by the evidence of bargaining at the Gaithersburg unit in January and February 2014 where ADT manager Nixdorf attempted to make changes to the HVCI pay plans, but those proposals were rejected. See, Transcript page 72, line 22-25 ("… so our position was, okay, if you don't accept Schedule C, then what we'll do is eliminate the provisions for high volume in the contract, and then there was a package deal with a wage increase.") The evidence that the HVCI pay plan "elimination" was proposed and withdrawn by the Employer during these negotiations in exchange for a "package deal with a wage increase" does not support the Employer's position that it has no bargaining obligation to OPEIU Local 2 regarding the April 2014 wholesale transfer of HVCI installers to an hourly-rate pay plan.

ADT's reliance on this language for its "waiver" defense is inconsistent with other provisions in the same Articles of the Springfield/Lanham and Columbia (Baltimore) CBAs. Each Article states in Section 3: "The provisions of Article 6 [hourly rates] do not apply to HVCI

employees." Therefore, ADT must concede that they have unilaterally eliminated the HVCI classifications in each of the CBAs in order for their current "contractual waiver" argument to make some textually logical sense. By unilaterally applying hourly rate provisions of the CBAs to HCVI employees on and after April 14, 2014, ADT has in fact unilaterally modified this Section 3 of the CBA.

Similarly inconsistent with the "contract waiver" theory is the language of Section 4 of the Article that establishes "an HVCI Joint Labor-Management Committee" to meet on a regular basis during the term of the CBA. However, this Section clearly states: "It is agreed that this committee will not address issues that would alter or amend this Agreement." OPEIU Local 2 submits that this express language bars either party from acting unilaterally with regard to the HCVI classification or pay plan during the term of the Agreement. Nothing in the Management Rights clauses or the Complete Agreement clauses of the CBAs, asserted by ADT in this investigation, privileges ADT to act unilaterally with regard to the elimination of the HCVI classifications and conversion of HCVI installers to hourly rates. In fact, a Complete Agreement Clause bars ADT's unilateral actions here under Sections 3 and 4 cited above.

Therefore, the language, past practices and bargaining history between the parties shows that ADT's April 2014 unilateral elimination of the HVCI classification and unilateral changes from the negotiated commission rates to the hourly rates for these installer employees confirm that the General Counsel has proven, by a preponderance of the evidence in this record, the allegations of paragraph 9(a) of the Complaint against ADT for violations of Section 8(a)(5) and (1) of the Act as encompassed within the charge filed by Charging Party OPEIU Local 2.

III. Amended remedies should include a requirement that Respondent ADT provide the information required by paragraph 9(a) of the Complaint so that OPEIU Local 2 may submit its grievance on the ADT claim of business justification to arbitration under the CBA in each unit.

OPEIU Local 2 has a right to information requested under Complaint paragraph 9(a) as to ADT's business justification for the elimination of the HVCI classification wage conditions in each of the three bargaining units because such information is relevant and necessary for the purposes of negotiating and administering the collective-bargaining agreements. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Allowing ADT to refuse to provide information on its "business needs" that it claims "dictate[s]" the pre-condition of the contract clauses at issue, places OPEIU Local 2 in an unfair position with regard to any burden of proof it needs to show a violation of the CBAs as to the HVCI conditions and wages. See *DaimlerChrysler Corp.*, 331 NLRB 1324, 1324–1325 (2000), enfd. 288 F.3d 434 (D.C. Cir. 2002)(requested information is necessary for the union in deciding whether to proceed to arbitration on grievance). ADT's production of the requested business justification information will allow OPEIU Local 2 to proceed under the dispute resolution procedures of the CBA to test the ADT actions under the terms of the collective bargaining agreements.

IV. Conclusion

OPEIU Local 2 respectfully requests that the exceptions of Counsel for the General Counsel, and the cross-exceptions of Charging Party OPEIU Local 2 be granted.

Date: December 24, 2014

Respectfully submitted,

OPEIU Local 2, AFL-CIO
Charging Party,
By Counsel:

s/ James F. Wallington

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CERTIFICATE OF SERVICE

I hereby certify that, on December 24, 2014, copies of the Charging Party OPEIU Local 2 Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge were electronically served on the following individuals by e-mail:

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